

State of Rhode Island
And
Providence Plantations

Commissioner of Education

Student L. Doe

v.

Cumberland School Committee

INTERIM ORDER DECISION

Held: Parents' request for an interim protective order is granted in part and denied in part. Student Doe's IEP should be corrected to include assistance with hygiene after eating as this provision was omitted from his IEP. The IEP should also be corrected to include the safety plan that was agreed to and the details of which were being drafted at the time of hearing. Staff who work with Student Doe are directed to use the potty chair provided by his parents at all times. Adult supervision during playground activities is being provided according to his IEP. The report from Bradley Hospital must be presented to the IEP team as soon as possible so that the team can make any revisions to the IEP that may be necessary to provide Student Doe with a free appropriate public education and to ensure his safety while at school.

DATE: September 13, 2010

Travel of the Case

On August 2, 2010 Student Doe's mother requested a hearing because it was her position that the Cumberland School Department was inconsistent in following the provisions of his Individualized Education Program ("IEP"). On August 3, 2010 the undersigned was designated to hear and decide this appeal. A letter of acknowledgment was sent to the parties on August 3, 2010. A hearing date of August 17, 2010 was selected by agreement and prior to that date the issues for hearing were clarified by an email from the hearing officer.

On August 17, 2010 both testimony and documentary evidence were received. The record closed on August 25, 2010 upon receipt of the transcript.

Jurisdiction to hear this matter arises under R.I.G.L. 16-39-3.2 "Interim protective orders."

ISSUE

Is the Cumberland School Department currently complying with the revisions of the Individualized Education Program developed for Student Doe on June 14, 2010?

Findings of Relevant Facts

- Student Doe is a four (4) year old child who lives with his parents in Cumberland, Rhode Island and attends a preschool program for students with disabilities in one of the district's elementary schools. Pet. Ex. 1.
- Student Doe's disabilities are such that he has poor coordination/balance and speech delays. He has expressive language deficits, behavioral impulsivity and limited gross motor abilities. Pet. Ex. 3 (June 4, 2010 report from the Brown Center).
- Student Doe's current IEP was finalized somewhat hurriedly in mid-June because at that time he was receiving only "walk in services" consisting of physical therapy, occupational therapy and speech therapy. His parents wanted him to be eligible to participate in the extended school year educational program the district would be operating during the summer. Earlier in the school year, his parents had taken him out of the pre-school program because of concerns about his safety and his inability to socialize with the other children. Tr. pp.30, 32-33; 161-163. Pet. Ex.2.
- The director of the pre-school center for the Cumberland School Department, in putting together the various pages of Student Doe's IEP, incorporated a description of "Supplementary Aids and Services/Program Modifications/Supports for School Personnel" (page 11) that did not include a sentence reflecting the team's agreement that Student Doe would be encouraged to use his napkin to wipe his mouth (and assisted in doing so) following snack. Tr. pp. 10, 64-72, 128-131, 148-150, 155; Pet.Ex.3¹.
- Student Doe's current IEP requires his daily use of a potty seat. His mother testified that she has received various indications that school staff are utilizing a urinal when they take him to the

¹ Mother testified that Student Doe has difficulty with the motion to use a napkin. She provides a napkin each day for him. If he is not encouraged/assisted with use of his napkin, he returns home with food on his mouth. Tr. pp.64-65.

bathroom². Student Doe is unable to use a urinal since he does not have the necessary fine motor skills. Mrs. Doe has received notes/logs from his teacher confirming that he is being brought to a urinal. As a result, he is coming home wet, sometimes through to his clothes. Tr. pp. 9, 81-82, 100-105.

- Per his IEP, Student Doe is to be provided with adult supervision at the playground. Mrs. Doe testified that she believes that the adult supervision he has been receiving does not comply with his IEP because “adult supervision” means an adult standing by his side at all times. Tr. pp. 105-110. It is her understanding that as many as twenty-four (24) students are out at recess at one time, with only four (4) adults to supervise them. Tr. p.151. It is her position that playground injuries³ he has received are the result of noncompliance with the IEP’s requirement that her son receive adult supervision at the playground. Tr. pp. 105-109.
- Mrs. Doe testified that it was agreed by the IEP team that a safety plan would be added to his IEP, but to date, it has not been. Tr. pp. 175-177; Pet. Ex.4 (email from Kathy Gibney to Mrs. Doe dated June 21, 2010). The director of the pre-school center acknowledged that there was a consensus reached that a safety plan would be part of his IEP, but that it was not yet finished. Tr. pp. 176-177.
- Mr. and Mrs. Doe have requested a due process hearing on issues related to his current IEP, and a due process hearing is scheduled for mid-October, 2010.

Positions of the Parties

Petitioner

Mr. and Mrs. Doe take the position that their son’s current IEP does not accurately reflect the IEP developed by his IEP team in that it has errors,⁴ omits reference to his need for encouragement and assistance with his use of a napkin after snack and does not include the safety plan that was supposed to be developed and added. With respect to compliance issues, Mrs. Doe submits that there is a need for closer adult supervision to ensure his safety when her son is in the playground with other children. She also argues that the district needs to adhere to use of a potty chair (as his IEP requires), and use it more frequently, so that her son’s basic needs are met when he is at school.

Throughout the hearing, issues were raised and identified as those which would more appropriately be presented to the due process hearing officer. Mr. and Mrs. Doe have requested an IDEA hearing, and a hearing officer has scheduled the matter for October 18, 2010. Mr. and Mrs. Doe suggested that changes in the IEP are necessary in order to provide him with a free appropriate public education. They submitted a report from Bradley Hospital dated August 16, 2010 that they had just received on the day of the hearing. Mrs. Doe indicated that the report “explains (Student Doe’s) condition and why we’re at where we’re at.” Implicitly, she argues that the findings and

² Mrs. Doe testified that she also believes that her son is not being taken to the bathroom often enough. Tr. pp. 81 - 82.

³ From the record it does not appear than any of these injuries was serious.

⁴ His physical therapy goal should read “by next March (Student Doe) will walk up 10/10 stairs with one foot on each step with a railing or close supervision” and on the page relating to “Supplementary Aids and Services/Program Modifications/Supports for School Personnel” should note that Student Doe uses a left sided railing on the stairs, not a right sided railing.

recommendations of Bradley Hospital should be considered by the Commissioner in fashioning an appropriate interim protective order in this matter.

Cumberland School Committee

Counsel for the School Committee takes the position that special education staff have complied with all of the provisions of his current IEP and argues that most of the issues raised by Student Doe's parents are changes to his program that are within the exclusive purview of the IEP team or a due process hearing officer. When Mr. and Mrs. Doe sought to have their son participate in the extended school year (ESY) program this summer, even though the parents had previously withdrawn him from the pre-school program, staff of the special education office acted quickly. The IEP team was convened to draw up an IEP so that he would be eligible to attend the pre-school program. If there are typographical errors, unintentional omissions, and an incomplete safety plan in his IEP, these are the result of the limited time school staff had to act before the end of the 2009-2010 school year and the start of the ESY program. Any errors or omissions will be addressed by the IEP team immediately at the beginning of the school year.

As to the recent report from Bradley Hospital, counsel indicates that this updated information will be shared with the Special Education Department so that any concerns that there might be with respect to Student Doe's program for the upcoming school year may be addressed appropriately. Cumberland indicates that the information (diagnoses, transition plan, recommendations) from Bradley Hospital will be considered by the IEP team when it is reconvened so that it can determine whether adjustments to the IEP need to be made in light of this information. Since the team is in the process of drafting a safety plan that is specific to Student Doe's needs, the report from Bradley Hospital may also influence the plan that is ultimately put in place to ensure his safety while at school.

DECISION

The evidence in this case indicates that Student Doe's IEP is somewhat of a work in progress and that communication issues have impeded the flow of information between the parents and special education staff of the district. It is also evident that there are genuine issues of dispute that do exist, particularly as they relate to Student Doe's basic needs (toileting and hygiene) and his safety while he is at school. Cumberland's special education administrators endeavored to develop an IEP quickly in June so that Student Doe would be eligible for summer services. He had been withdrawn from the preschool special education program by his parents earlier in the school year. As a result, there are two apparent errors in the document⁵ (that the district indicated will be corrected as soon as school starts and the IEP team can be convened) and the IEP is not totally complete.

There are two respects in which his current IEP was shown to be incomplete. The first was the omission of a sentence with respect to napkin use. The omission of the sentence that describes Student Doe's need for encouragement/assistance with his napkin after snack will, the district submits, be reinserted as soon as the IEP team can meet in September. This was an omission from the document that resulted from the physical therapist's unavailability in late June when the pre-school center director was intent on getting a written document in place. Mrs. Doe's assertion that his IEP is incomplete because it does not contain a safety plan that the team agreed to develop was verified by the pre-school center director at the time of the hearing. The director testified that the safety plan is in

⁵ See footnote 4

draft form, and will be finalized once the school year begins. Both parties agree that the safety plan is important, given the nature of Student Doe's disabilities.

With respect to compliance issues, there is sufficient evidence on this record to conclude that school staff were not utilizing a potty chair for all of Student Doe's toileting needs and were having him use a urinal. His mother explained why the IEP calls for his use of a potty seat and, although it may have been a communication issue, staff who work with Student Doe need to make sure that this provision of his IEP is strictly adhered to. There was insufficient evidence to conclude that Student Doe was not being brought to the bathroom with sufficient frequency. It may be that a log indicating times of use of the potty seat would be helpful in resolving Mr. and Mrs. Doe's concerns in this regard.

As to adult supervision during times Student Doe is at the playground with other children, there was no evidence that the district is not complying with his IEP in this regard. If Mr. and Mrs. Doe take the position that this provision of his IEP is inappropriate, then this issue should be raised in the course of the due process hearing that has been scheduled. There was insufficient evidence on this record that the "side by side" level⁶ of supervision that Mrs. Doe contends is required by his current IEP is necessary to ensure his safety when he is at the playground.⁷

The parties agreed to provide the August 16, 2010 report from Bradley Hospital,⁸ together with any transition plans, discharge summaries or other information that would be helpful, to the members of the IEP team. The indication from the Cumberland School Department was that an IEP team meeting would be scheduled promptly at the beginning of the school year. The team will attend to making corrections to the IEP as necessary, finalizing the safety plan, and making any other adjustments that the team may deem necessary. It was evident at the hearing that all parties are intent on providing Student Doe with a free appropriate public education and that they are working very hard to do so.

For the foregoing reasons, the Petitioners' request for an interim order is sustained in part and denied in part, as set forth in detail in this decision.

For the Commissioner,

Kathleen S. Murray

September 13, 2010

Date

Deborah A. Gist

⁶ Which the district submits would actually be one-on-one supervision.

⁷ The August 16, 2010 report from Bradley Hospital recommends a one-on-one aide for Student Doe throughout the school day to ensure his personal safety. The parties had not had opportunity to review and respond to this report at the time of the hearing. It was indicated that the report, together with other updated information from Bradley Hospital, would be made available to the members of the IEP team. If the issue of a one-on-one aide, or any other health and safety issues, exist after the team has had a chance to consider this information, Mr. and Mrs. Doe may request another interim order hearing pending resolution of these issues before a due process hearing officer. See In Re: Meghan G., decision of the Commissioner dated July 19, 1999.

⁸ Where Student Doe was admitted on July 20, 2010 and was still in attendance at the time of the hearing on August 17, 2010.